Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1257

JAMES F. SEXTON,
Petitioner,

vs.

THE CLEVELAND ATHLETIC CLUB, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

JAMES F. SEXTON,

Petitioner,

vs.

THE CLEVELAND ATHLETIC CLUB, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Ohio, entered in this proceeding on November 16, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of Ohio,

Eighth District, is unreported and appears at page A5 of the Appendix. The opinion of the Court of Common Pleas, Cuyahoga County, Ohio, is unreported and appears at page A1 of the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on November 16, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether judicial officers of a State have the right arbitrarily and capriciously to act in disregard of clear and precise statutory language so as to deny this petitioner due process of law and equal protection of the law as guaranteed by the Constitutions of the State of Ohio and of the United States.

2. Whether judicial officers of a State have the right to undermine the jury system by denying

petitioner's access to the Ohio courts for redress and the right to a jury trial in disregard of the due process and equal protection provisions of the Constitutions of the State of Ohio and of the United States.

CONSTITUTION AND STATUTES INVOLVED

The Constitutional provisions involved are Article I, Sections 5 and 16, of the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States. The Constitutional provisions are set forth in the Appendix.

STATEMENT OF THE CASE

This case originated as an action in libel filed on June 28, 1974, in the Ohio Court of Common Pleas for Cuyahoga County. Petitioner filed a demand for a jury trial, which he was denied. Instead, the Court of Common Pleas decided the case adversely to petitioner on a motion for summary

judgment. In so deciding, the trial judge resorted to various depositions as the basis for his deciding. The evidential content of these depositions was in conflict, particularly considering inferences deriving from circumstances surrounding a letter claimed to have been destroyed, so that the case excludes the consideration of circumstantial evidence in a libel action. In the meantime, an affidavit of prejudice had been filed against the trial judge to whom the case originally had been assigned. The Ohio statutes define the procedures to be followed in such instance. These procedures were not followed either as to the original affidavit filed against the first judge; nor were they followed as to a second affidavit filed pertaining to any judge assigned to the case in disregard of Ohio statute. In the meantime, the grant of summary judgment in light of a factual dispute arising from circumstantial evidence denied petitioner his right to a jury trial.

REASONS FOR GRANTING THE WRIT

I. THE OHIO STATUTES ARE CLEAR AND PRECISE IN DEFINING THE PROCEDURES TO BE FOLLOWED RESPECTING AFFIDAVITS OF PREJUDICE. THE OHIO AND UNITED STATES CONSTITUTIONS CONTEMPLATE FAIRNESS AT ALL STAGES OF JUDICIAL PROCEEDINGS. THAT A LITIGANT IS DENIED SAFEGUARDS ACCORDED BY STATUTE MILITATES AGAINST SUCH FAIRNESS.

Section 2701.03, Ohio Revised Code, defines the procedures respecting the filing of an affidavit of prejudice. It states:

"*** on the filing of an affidavit (of prejudice) by any party to such cause or matter *** the clerk of the court of common pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the presiding judge of the court of appeals for the district in which such court of common pleas is located. If such presiding judge

finds that such judge of the court of common pleas is disqualified he shall forthwith notify the chief justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. ***"

The statute is explicit. It has been completely disregarded in this case and in a manner contrary to other decided Ohio cases, thus according this petitioner an entirely different and unequal standard of law. Compare Adams v. Watts, Justice of the Peace, et al., (1940) 67 Ohio App. 81, 35 N. E. 2d 845; Tumbleson v. Noble (1959) 109 Ohio App. 242, 164 N. E. 2d 808; Cuyahoga County Board of Mental Retardation v. Association of Cuyahoga County Teachers (1975), 47 Ohio App. 2d 28, 351 N.E. 2d 777. That judicial officers flagrantly and arbitrarily disregard the clear and precise language of this statute also is indicative that those same judicial officers would fail to recognize a genuine

issue of fact.

II. THE GRANT OF SUMMARY JUDGMENT IN THIS CASE DENIES PETITIONER ACCESS TO THE OHIO COURTS FOR JUDICIAL REDRESS AND FURTHER DENIES HIM A JURY TRIAL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

73 Am. Jur. 2d 726, Summary Judgment, Section 4, states:

" * * * There are three classes of litigation which are not usually suited for summary disposition, namely, negligence actions, cases where motive, intent, consciousness, conscience, or subjective feelings and reactions are involved, and equitable actions * * *."

Friedman et al. v. Meyers et al., 482 F. 2d 435 (2d Cir., 1973), to the same effect, at page 439, states:

"The other claims and defenses in the present suit bristle with genuine issues as

to the material facts. For instance, issues are raised as to the state of mind, intent and knowledge of the parties. We have repeatedly stated that summary judgment is particularly inappropriate where, as here, it is sought on the basis of 'the inferences which the parties seek to have drawn (as to) questions of motive, intent, and subjective feelings and reactions.' (citation of cases omitted) * * *."

In accord with this view, see also Conrad v. Delta Air Lines, Inc. 494 F. 2d 914, at page 918 (7th Cir., 1974). Libel is an action particularly involving motive, intent, and subjective feelings and reactions. Article I, Section 16, of the Constitution of the State of Ohio (App., pg. A 27), guarantees this petitioner access to the judicial system for redress of grievance. Article I, Section 5, of that same Constitution (App., p. A 27) provides that such redress shall be by jury trial.

Amendment Fourteen, Constitution of the United States (App., p. 28) becomes in this regard additional Constitutional protection. For any judicial officer of a State, under the circumstances of this case, to sustain a motion for summary judgment becomes destructive of the jury process, the judicial system and our entire constitutional structure.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opon of the Supreme Court of Ohio.

Respectfully submitted,

James F. Sexton

Counsel for Petitioner

OPINION OF THE COURT OF COMMON PLEAS

(Filed October 31, 1977)

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

JAMES F. SEXTON	)	CASE NO. 930,708
Plaintiff	)	
vs.	)	MEMORANDUM
THE CLEVELAND ATHLETIC CLUB, et al	)	OF DECISION
Defendants	)	

This matter came on for hearing before the Court upon the defendant Cleveland Athletic Club's Motion for Summary Judgment, the pleadings and accompanying documents.

It appears from the evidence that reasonable minds can come to but one conclusion and that conclusion is adverse to the plaintiff. After construing the evidence most strongly in favor of

plaintiff, the Court finds that there was no slander or libel of the plaintiff by the defendant, Cleveland Athletic Club, and that all statements regarding plaintiff by members, agents and employees of the said defendant were conditionally privileged.

Defendant Cleveland Athletic Club is entitled to judgment against plaintiff James F. Sexton, and this cause is ordered dismissed with prejudice, at plaintiff's costs.

The said defendant's counsel is asked to prepare a suitable judgment entry, submit it to plaintiff's counsel, and then tramsmit it to the undersigned for signing.

s/ Merle Hoddinott, Judge
(Sitting by assignment
from Monroe County)
Box 563
Woodsfield, Ohio 43793

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 29, 1977)

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

JAMES F. SEXTON	)	CASE NO. 930,708
Plaintiff	)	
vs.	)	
THE CLEVELAND ATHLETIC CLUB, et al	)	JUDGMENT ENTRY
Defendants	)	

This action came on for hearing before the court upon the defendant, The Cleveland Athletic Club's Motion for Summary Judgment, the pleadings and accompanying documents on the 28th day of October, 1977, and the issues having been duly heard with all parties having participated in the oral hearing and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing, that the action be dismissed on

the merits with prejudice at plaintiff's cost and that judgment be entered for the defendant, The Cleveland Athletic Club, for the costs of the action.

s/ Merle Hoddinott, Judge

(Sitting by assignment from Monroe County)

Box 563

Woodsfield, Ohio

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS

(Filed July 12, 1979)

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 3 8 9 9 0

JAMES F. SEXTON	)	
APPELLANT	)	JOURNAL ENTRY
-vs-	)	AND
THE CLEVELAND ATHLETIC CLUB	)	OPINION
APPELLEE	)	

STILLMAN, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error

was reviewed and upon review the following disposition made:

In July of 1973, appellant, James Sexton, applied for membership in The Cleveland Athletic Club, a private organization located in downtown Cleveland. His application was processed in accordance with the club's standard admission procedure. On September 13, 1973, appellant was notified by letter that the Club's Admissions Committee had failed to take any action with respect to his application.

On June 28, 1974, appellant instituted an action for slander and libel by filing a complaint against appellee, The Cleveland Athletic Club, in the Common Pleas Court of Cuyahoga County. In his complaint, appellant alleged as follows:

1. The defendant is a corporation organized and existing under and by virtue of the laws of the State of Ohio.

2. The plaintiff filed an application for

membership in the defendant organization on which plaintiff was advised no action was taken.

3. Plaintiff made written inquiry as to the nature of any remarks made to its membership committee concerning this plaintiff. Plaintiff received no reply to said written inquiry.

4. Plaintiff states, on information and belief, that remarks slanderous and libelous to this plaintiff were made to said membership committee and by said committee were published and circulated among the members of said committee.

5. Plaintiff states, on information and belief, that said remarks were false and injurious to the employment and profession of the plaintiff, who is an attorney and also is certified to practice accountancy.

Appellant further asserted that he had sustained

damages in the amount of $50,000.00 as a result of the alleged defamation on the part of appellee. Appellant also stated that he was entitled to punitive damages in the amount of $25,000.00.

The case was assigned to Judge Lloyd O. Brown. On August 5, 1974, appellant filed an amended complaint that added two "John Doe" defendants. The lawsuit was later dismissed as to these defendants because service of process had never been made upon them.

Appellee filed a motion to dismiss for failure to state a claim upon which relief can be granted. The motion was overruled on March 12, 1975.

Subsequently, appellee filed an answer to appellant's complaint. In this pleading, appellee admitted that it is an Ohio corporation, that appellant had inquired as to whether any comments regarding his application for membership had been made to appellee's Membership Committee, and that Appellant had received no response to his request

for information. Appellee denied the remaining allegations contained in appellant's complaint.

On November 20, 1975, appellant filed a document entitled "Affidavit of Prejudice". In this affidavit, appellant maintained that Judge Brown had "exhibited a bias and prejudice" against appellant. Appellant's reasons for this contention were as follows:

> Motions presently before the Court were filed by plaintiff on October 31, 1975, and deposited pursuant to said judicial officer's instruction in the Clerk's office at 1560 East 21st Street, Cleveland, Ohio, so that consideration could be given by said judicial officer immediately thereto in view of the trial date set by said judicial officer. Said judicial officer further by registered letter dated November 13, 1975, was advised that plaintiff was not asking a continuance and was readying his case for trial. Said preparation involves

> time and monetary cost with the result that any continuance made by said judicial officer on November 24, 1975, evidences deliberate bias and prejudice, with the further result that going forward by trial evidences deliberate bias and prejudice because it has denied plaintiff his discovery and other rights by said judicial officer's failing to act on discovery and other motions prior to the said trial date, ...

Thereafter, Judge Brown voluntarily disqualified himself from acting in the proceeding. The case was reassigned to Judge Robert L. Simmons.

Appellee filed a motion for summary judgment on November 21, 1975. Appellee asserted that the amended complaint and eight depositions demonstrated that there was no genuine issue as to any material fact and that appellee was entitled to judgment as a matter of law. Appellant submitted a brief in opposition to appellee's motion.

The trial court denied the motion for summary judgment. The court ruled that the motion was premature because appellant had not yet completed discovery.

On December 10, 1976, the case was transferred to Judge Joseph J. Nahra. The action was subsequently assigned to Judge Frederick M. Coleman.

Appellee renewed its motion for summary judgment on June 23, 1977. The motion was based upon the eight original depositions, three continued depositions and six additional depositions. All but one of these depositions were taken by appellant.

Thereafter, appellant filed a brief in opposition to the motion for summary judgment. On October 5, 1977, appellant filed a document captioned "Plaintiff's Affidavit In Opposition To Motion for Summary Judgment And Affidavit of Prejudice". With respect to the claim of prejudice, appellant stated as follows:

The administrative handling of this lawsuit by this court of common pleas has been highly prejudicial to plaintiff, as is apparent from any examination of the record herein. The administrative handling of a case includes the assignment of a case to a judge. Upon the filing of an affidavit of prejudice, the provisions of Section 2701.03, Ohio Revised Code, become controlling; and such an affidavit already has been filed in this case. The provisions of the statute are mandatory and neither a judge of the court of common pleas nor its clerk have the authority to disregard the plain provisions of that statute. In the meantime, without the statute being followed, there has been a succession of judges in the case: Judge Brown, Judge Simmons, Judge Nahra, Judge Coleman, and plaintiff now is advised that the case is to be assigned to a visiting judge. Plain-

tiff finds it unusual for Judge Coleman to disqualify himself unless there is a reason. If there is a reason, then he should have taken no action in the case. The case now is to be assigned to a visiting judge, apparently indicating that there will be a bias and prejudice in favor of the Cleveland Athletic Club, with a consequent bias and prejudice against the plaintiff, in the event a local judge is assigned to the case.

. . . It is quite apparent that plaintiff has prejudiced by the failure of this court of common pleas and of its clerk to follow the provisions of Section 2701.03, Ohio Revised Code, as it applies to judicial conduct. As a consequence, any judicial officer of the court of common pleas who proceeds to take any action in this case is doing so contrary to statute and is without jurisdiction. Any further delay by appeal of a decision on a

motion for summary judgment would be particularly prejudicial to this lawsuit. Plaintiff therefore constitutes this his affidavit of bias and prejudice against any judge of the court of common pleas, or any clerk or other official under his direction, making an assignment of a judge to this case, be he a visiting judge or otherwise, and plaintiff further makes this an affidavit of bias and prejudice against any judge, visiting or otherwise, assigned by a judge of the court of common pleas or under his direction, as having a bias and prejudice in favor of the Cleveland Athletic Club and a bias and prejudice against plaintiff.

The case was transferred to Judge Merle Hoddinott, who conducted a hearing on the motion for summary judgment on October 28, 1977, and subsequently ordered that the action be dismissed on the merits with prejudice. The decision was

journalized on December 29, 1977.

Appellant timely filed a notice of appeal. Five errors have been assigned:

I. THE COURT OF COMMON PLEAS ERRED BY ENTERING A DECISION IN THE CASE WITHOUT A COMPLIANCE WITH THE PROVISIONS OF SECTION 2701.03, OHIO REVISED CODE.

II. THE COURT OF COMMON PLEAS ERRED BY DECIDING A MOTION FOR SUMMARY JUDGMENT WHEN THE FACTS WERE IN DISPUTE.

III. THE COURT OF COMMON PLEAS ERRED BY DECIDING A CASE ON A MOTION FOR SUMMARY JUDGMENT WHEN THE DEFENDANT-APPELLEE FAILED TO MAKE SERVICE UPON THE PLAINTIFF-APPELLANT OF ALL DOCUMENTS UPON WHICH THE MOTION WAS BASED.

IV. THE COURT OF COMMON PLEAS ERRED BY DENYING PLAINTIFF-APPELLANT HIS RIGHT TO A JURY TRIAL.

V. THE COURT OF COMMON PLEAS ERRED BY A JUDGE DECING (sic) A CASE WHEN AN AFFIDAVIT OF PREJUDICE WAS OUTSTANDING AGAINST HIM.

Since the first and fifth assignments of error are interrelated, they are being considered together. R. C. Section 2701.03 is concerned with the disqualification of a trial court judge. This statute provides:

> When a judge of the court of common pleas is interested in a cause or matter pending before the court, is related to, or has a bias or prejudice either for or against, a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, <u>setting forth the fact of such interest, bias, prejudice, or disqualification,</u> the clerk of of the court of common pleas shall enter the fact of such filing on the trial docket in

in such cause and forthwith notify the presiding judge of the court of appeals for the district in which such court of common pleas is located. If such presiding judge finds that such judge of the court of common pleas is disqualified he shall forthwith notify the chief justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is filed. The judge so assigned shall try such matter or cause. Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause. (Emphasis added)

We conclude that compliance with the above provisions was not required in the present case. Initially, appellant filed an affidavit of preju- against Judge Brown. Judge Brown promptly disqualified himself from acting in the matter,

thereby alleviating the necessity for a proceeding pursuant to R. C. Section 2701.03.

The action was subsequently assigned to Judges Simmons, Hahra, and Coleman. Appellant did not challenge their authority to act in the case until after he had discovered that the lawsuit was to be transferred to yet another judge. At that point, appellant submitted another affidavit of prejudice which contained broad allegations unsupported by any concrete facts.

A reading of R. C. Section 2701.03 indicates that the statute contemplates that a party filing an affidavit of prejudice must set forth specific facts which demonstrate interest, bias, or prejudice on the part of a judge. In the instant case, appellant failed to do so. Therefore, the trial court (Judge Hoddinott) did not err in disregarding the second affidavit of prejudice and rendering a decision on the merits of the case.

For the foregoing reasons, the first and fifth

assignments of error are overruled.

Concerning the second assignment of error, Civil Rule 56(C) provides in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being

> being entitled to have the evidence or stipulation construed most strongly in his favor.

The instant action is concerned with the torts of libel and slander. Libel is defined as a false and malicious publication made with the intent to injure a person's reputation or expose him to public hatred, contempt, ridicule, shame or disgrace, or to affect him adversely in his trade or provession. Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co. (1974), 43 Ohio App. 2d 105. The elements of slander are identical to those of libel except that slander involves an oral statement rather than a written publication. See, Fawcett v. G. C. Murphy & Co. (1976), 46 Chio St. 2d 245.

In order to prevail in an action for libel or slander, the plaintiff must prove the following: 1) that the claimed words were published or spoken; 2) that the words were published or spoken by the defendant; 3) that the words were

published or spoken intentionally and maliciously; that the words were communicated to one or more persons other than the parties to the lawsuit; 5) that the words were damaging. 3 Ohio Jury Instructions Chapter 329.

In an action for libel or slander, it is essential that the plaintiff set forth the words which he claims were defamatory. Van Ingen v. Newton (1857), 12 Ohio Dec. Reprint 746. If the plaintiff fails to do so, there cannot be any factual issues for resolution. In such a situation, it is apparent that the defendant is entitled to judgment as a matter of law.

In the instant case, appellant did not set forth the remarks which he maintains were libelous and slanderous. The complaint, amended complaint, and depositions are all devoid of any reference to the alleged defamatory language. Therefore, the entry of summary judgment in favor of appellee was appropriate.

The second assignment of error is not well taken.

Regarding the third assignment of error, Civil Rule 56, which is concerned with summary judgment, provides that affidavits in support of a motion for summary judgment must be served upon the opposing party. However, the rule does not require a party filing a motion for summary judgment to serve depositions upon his opponent.

In the case at bar, appellee did not submit any affidavits in support of its motion for summary judgment. The motion was based upon the pleadings and numerous depositions. Appellee was not required to serve the depositions upon appellant.

The third assignment of error is overruled.

Turning to the fourth assignment of error, it is well settled that an entry of summary judgment in a case in which there is no genuine issue as to any material fact does not constitute a

denial of the right to a jury trial. Houck v. Ross (1973), 34 Ohio St. 2d 77.

In the present case, there were no factual issues to be determined. Thus, in entering summary judgment for appellee, the trial court did not infringe upon appellant's right to a jury trial.

The fourth assignment of error is without merit.

Accordingly, we affirm the judgment heretofore rendered.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall consti-

tute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

s/ SAUL G. STILLMAN

JUDGE

PARRINO, C. J., and

PATTON, J., CONCUR.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1979 TERM
City of Columbus	) To wit:	November 16, 1979
James F. Sexton, Appellant vs. The Cleveland Athletic Club, et al., Appellees.	)	No. 79-1282 MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1979 TERM
City of Columbus	) To wit:	November 16, 1979
James F. Sexton, Appellant vs. THE CLEVELAND ATHLETIC CLUB et al., Appellees	)	No. 79-1282 APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ARTICLE I, SECTION 5, CONSTITUTION OF THE STATE OF OHIO

5. Trial by jury.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

ARTICLE I, SECTION 16, CONSTITUTION OF THE STATE OF OHIO

16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brough against the state, in such courts and in such manner, as may be provided by law.

AMENDMENT XIV, SECTION I, CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.